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VERSUS United States

Date	Proceedings and Orders
Jul 27 1987	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Sep 9 1987	Order extending time to file response to petition until October 8, 1987.
Oct 9 1987	Brief of respondent United States in opposition filed.
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Oct 15 1987	DISTRIBUTED. October 30, 1987
Oct 27 1987	Reply brief of petitioner John C. McCulloch filed.
Nov 2 1987	REDISTRIBUTED. November 6, 1987
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Nov 9 1987	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan joins. (Detached opinion.)

EDITOR'S NOTE

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87-5170

CASE NUMBER 87-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN C. McCULLOCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals, Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

WHETHER CONVICTIONS FOR PARTICIPATION IN A RACKETEER INFLUENCED AND CORRUPT ORGANIZATION (RICO), AND RICO CONSPIRACY, MAY STAND IN LIGHT OF SUBSEQUENT VACATION OF CONVICTIONS OF THE PREDICATE ACT CRIMES UPON WHICH THE TWO RICO CONVICTIONS MAY HAVE BEEN BASED, AND WHERE THERE WAS NO SPECIAL JURY VERDICT INDICATING UPON WHICH PREDICATE ACTS THE JURY RELIED IN FINDING GUILT ON THE RICO AND RICO CONSPIRACY CHARGES.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

Besides the Petitioner and Respondent, other co-defendants in the original criminal convictions were parties to the proceedings in the Court from which review is here sought (the Eleventh Circuit Court of Appeals). Those individuals are Messrs. George Washington Cooper, III, Jerry Herbert Jones, and Ferrol "Bud" McKinney.

OPINIONS BELOW

The Opinion of the Eleventh Circuit herein is not reported as yet, but appears at pages 1 through 2 of the Appendix hereto. That Opinion specifically incorporates the Opinion of the District Court from which the appeal to the Court of Appeals was taken. The District Court Opinion appears in Cooper v. United States, 639 F. Supp. 176 (M.D. Fla., 1986).

JURISDICTION

The judgment below was entered on June 8, 1987. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

STATUTES INVOLVED

This action involves convictions relating to prohibited activities involving Racketeer Influenced and Corrupt Organizations (RICO) as defined in 18 USC §1962(c) and (d), which necessarily incorporate the definition of "racketeering activity" as contained in 18 USC §1961(1) and (5). Those statutes read, in relevant part:

> "§1962. Prohibited Activities.
>
> "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> "(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section."
>
> "§1961. Definitions.
> As used in this chapter--
>
> "(1) 'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to probibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor

vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffick), (c) any act which is indictable under title 29, United States code, section 186 (deaing with restrictions on payments and loans to labor organizations), or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;"

"(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;"

STATEMENT OF THE CASE

The Petitioner, John C. McCulloch (hereinafter "the defendant"), was originally indicted by the United States of America (hereinafter "the government") in a 78-Count Indictment involving 18 defendants. The specific charges against him were for one count of engaging in a conspiracy to join a Racketeer Influenced and Corrupt Organization (RICO); one count for a substantive RICO violation; six counts of Interstate Transportation of Stolen Property (ITSP); five counts of wire fraud; and one count of conspiracy to infringe the copyrights in various sound recordings.

Subsequently, defendant filed a Motion to Dismiss the Indictment. The Motion to Dismiss alleged, inter alia, that Counts 4 through 9 (Interstate Transportation of Stolen Property - ITSP) should be dismissed for the fundamental reason that violation of another's copyrights could not form the basis for the prosecutions under the ITSP statute, but instead should be alleged as violations of the Federal Copyright Act.

This Motion to Dismiss has significance with regard to the RICO conspiracy and substantive RICO allegations, as well, because the ITSP charges were alleged as "predicate act" crimes in the two RICO charges, pursuant to 18 USC §1961(1)(B). The prosecutor admitted that "under the government's theory, it is the aggregation of sounds (taken in violation of the copyright laws), not the tangible phono record itself, that constitutes the stolen 'goods, ware, merchandise.'" He further asserted that "criminal copyright infringement, whether it be sound recordings, films or other artistic or literary merchandise, may be the underlying crime in a §2314 violation." Nonetheless, the Motion to Dismiss was denied by the trial Court with an Opinion.

After matters unrelated hereto, the case proceeded through the presentation of evidence and then to the charge of the jury. One instruction advised the jury that it could convict the defendant under Count I (RICO conspiracy) if it found, in part, that he had agreed to the commission of at least two of any of the predicate offenses in Counts 4 through 9 (ITSP) or Counts 20 through 24 (wire fraud). The jury was also advised that it could convict the defendant on the RICO charge if it found he committed any two of the ITSP or Wire Fraud offenses and as such conducted, or participated in, a racketeering enterprise with which he was associated.

Thereafter, the jury returned a verdict of guilty against Mr. McCulloch on all counts charged. This included a general verdict of guilt as to the RICO conspiracy and RICO charges without any indication as to whether the jury found that the defendant had agreed to commit wire fraud, or had committed any wire fraud crimes as part of his participation in, or conduct of, a racketeering enterprise. The defendant also was never charged with, nor found guilty of, wire fraud conspiracy. There was simply no indication that the jury found he had agreed to commit wire fraud or performed it as a part of the enterprise.

Subsequently, this defendant filed Motions for Arrest of Judgment and for New Trial, which Motions were denied. The defendant alleged, inter alia, that the verdict was contrary to the law and evidence. Thereupon a judgment and commitment as to all counts against Mr. McCulloch was entered, and the defendant timely filed his Notice of Appeal.

The Eleventh Circuit Court of Appeals denied the direct appeal from the convictions, essentially finding only that an individual could properly be convicted for the interstate

transporation of stolen property based upon copyright violations such as those which occurred here. United States v. Drum, 733 F.2d 1503 (11th Cir. 1984). This Court subsequently denied certiorari in the case at 105 S.Ct. 543 (1984).

After the foregoing, this Court issued its opinion in Dowling v. U.S., 473 U.S. ____, 105 S.Ct. 3127, 87 L.Ed. 2d 152 (1985). That case held, contrary to the prior rulings of the District Court and the Court of Appeals here, that copyright violations could not form the basis for ITSP convictions.

Based upon Dowling, the defendant filed a Motion under 28 USC §2255 to vacate and set aside his convictions. The District Court granted the Motion with regard to his convictions for the Interstate Transportation of Stolen Property, but denied the Motion as it related to the RICO and RICO conspiracy convictions. Cooper v. United States, 639 F.Supp. 176 (M.D. Fla., 1986). The defendant was then resentenced to the same aggregate sentence he had originally received.

Appeal was then taken to the Eleventh Circuit with regard to the aspects of the relief sought in the §2255 Motion which were denied. That court denied the appeal, and adopted the Opinion of the District Court in doing so. [Appendix, pp. one and two].

REASON FOR GRANTING THE WRIT OF CERTIORARI

THE CIRCUIT COURT OPINION BELOW IS IN DIRECT AND EXPLICIT CONFLICT WITH AN OPINION OF ANOTHER CIRCUIT COURT REGARDING RACKETEER INFLUENCED AND CORRUPT ORGANIZATION CASES, AND IN CONFLICT WITH THE REASONING IN OPINIONS OF THIS COURT AND ANOTHER FOUR CIRCUIT COURTS.

In United States v. Brown, 583 F. 2d 659 (3d Cir., 1978), Cert. Den. 440 U.S. 909, 99 S. Ct. 1217, 59 L.Ed. 2d 456 (1979), two defendants were charged with one count of operating a business through a pattern of racketeering activity, and one count of conspiracy to commit that offense. Of course, the relevant racketeering statute, 18 USC §1961(5), defines a pattern of racketeering activity as requiring at least two predicate acts of racketeering activity as further defined in §1961(1). The defendants were also charged with four separate crimes which are racketeering acts within the statutory definition. The trial court charged the jury that a finding of guilt under any two of the substantive counts could support convictions under the RICO and RICO conspiracy counts.

At trial, the defendants were convicted on all four of the predicate counts, as well as the two RICO counts. On appeal, however, two of the predicate convictions were reversed for insufficiency of evidence. The Third Circuit ruled, therefore, that the RICO and RICO conspiracy convictions must also be reversed. Its reasoning was that it would be impossible to determine upon which two substantive counts the jury relied in returning a guilty verdict on the two RICO charges. In other words, though the defendants were still convicted of two counts of substantive offenses which could have formed the basis for the RICO convictions, the Appellate Court could in no way determine if the jury believed the defendants operated their business through a pattern of racketeering activity consisting of these two crimes, much less that they had a separate agreement to do so.

The relevant facts in the case from which review is here sought are identical, but the result was exactly the opposite. This defendant was charged with one RICO and one RICO conspiracy count, and six counts of interstate transportation of stolen property and five counts of wire fraud. The jury was instructed that it could rely on any two of the ITSP or wire fraud counts to convict on the RICO and RICO conspiracy charges. The defendant was convicted of all of the predicate offenses, but all of the ITSP convictions have now been vacated because the original Indictment failed to allege a crime as to those charges. However, the District Court refused to vacate either the RICO or RICO conspiracy charges, and the Circuit Court adopted that opinion. The District Court specifically stated in its Opinion, though, that if the Brown rationale were applied to this cause, "It seems clear ... this Court would be required to set aside petitioner's RICO convictions." Cooper v. United States, 639 F.Supp. 176, 181 (M.D. Fla., 1986). The Court declined to apply Brown, however, because of other precedent within the Eleventh Circuit.

The Opinion in Brown and other similar cases, though, has its genesis in the sound reasoning of this Court as contained in Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117 (1930). There, a defendant was charged with one count of criminal activity under a statute that proscribed three types of conduct. Though only one crime was charged, it was alleged that the defendant had committed violations under all three clauses of the statute. The jury was instructed that they could return a verdict of guilt with respect to conduct violating any one of the three clauses, and it returned a guilty verdict. The verdict, though, did not specify the clause or clauses upon which it rested. This Court subsequently found the proscription under one of the clauses to be unconstitutional, and accordingly vacated the conviction because

the Court declined to speculate as to whether the jury had relied only on activity violating that clause subsequently found to be unconstitutional to return its verdict.

Brown, supra, also evolved from a line of earlier cases within the Third Circuit applying similar reasoning. United States v. Tarnopal, 561 F. 2d 466 (3d Cir., 1977) (similar ruling in a conspiracy case).

Other Circuits, under similar facts, have arrived at the same results as would this Court and the Third Circuit upon the foregoing rationale. In United States v. Irwin, 654 F. 2d 671 (10th Cir., 1981), the defendant was charged with conspiracy and three other types of substantive offenses. The conspiracy charge incorporated the substantive offenses. Again, the jury was instructed that as to the conspiracy count it could rely upon alternate substantive offenses for conviction. Certain substantive charges failed on appeal as a matter of law, and the conspiracy conviction was also vacated because the Court would not speculate as to in which offenses the jury felt the defendants actually conspired.

In United States v. Kavazanjian, 623 F. 2d 730 (1st Cir., 1980), defendants were charged with substantive offenses relating to different types of encouraging or inducing unlawful entry of aliens into the country. They were also charged with conspiracy to commit the same. A similar jury instruction was given, and some of the substantive convictions were vacated because the Indictment, as here, did not state a crime as to them. The conspiracy convictions were, accordingly, also vacated.

In United States v. Carman, 577 F. 2d 566 (9th Cir., 1978), the Court stated under similar facts where the jury had again been told the conspiracy could rely on any one of multiple substantive offenses alleged:

> "If the jury, when considering the conspiracy count, focused only on the crime embodied in the subsequently overturned substantive crime conviction, the conspiracy conviction also should be overturned. Of course, if it focused on other crimes as well, the conspiracy conviction should be sustained. The one-is-enough charge makes it impossible to know precisely what the jury considered. Not knowing, a reviewing court must overturn the conspiracy conviction. Criminal sanctions cannot rest on what an appellate court thinks the jury would have done had the issues put to it been framed differently."

Id., at 567-568.

Finally, in Van Liew v. United States, 321 F.2d 664, 672 (5th Cir., 1963) a conspiracy conviction was likewise overturned when a portion of the conspiracy count was held to not set forth illegal objectives and a guilty verdict was general.

The Opinion of the Eleventh Circuit herein is very directly and specifically in conflict with the Opinion in United States v. Brown, 583 F. 2d 659 (3d Cir., 1978). It is also in conflict with the reasoning of all the other cases cited herein. When a jury is instructed that it may return a verdict of guilt on a RICO charge based on a finding that a defendant committed two or more of many alleged predicate acts, and it returns such verdict without indicating upon which predicate acts it relied, it is impossible to know if it convicted solely on legally deficient allegations. The problem is exacerbated in a RICO conspiracy situation because one not only cannot know which acts the jury believed the defendant committed as a part of the enterprise, but also cannot know which acts they believed he agreed to commit in furtherance thereof.

Respectfully submitted,

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Nos. 87-5170 and 87-5266

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN C. McCULLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY H. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' racketeering convictions were subject to collateral attack because their convictions on some of the predicate acts, also charged as substantive crimes, were invalidated in response to this Court's decision in Dowling v. United States, 473 U.S. 207 (1985), when several convictions for wire fraud remained valid and supplied more than the requisite number of racketeering acts.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

87-5170

JOHN C. McCULLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

87-5266

JERRY H. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (87-5170 Pet. App. 1a-2a) is unreported. The opinion of the district court is reported at 639 F. Supp. 176.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1987. The petition for a writ of certiorari in No. 87-5170 was filed on July 27, 1987; the petition in No. 87-5266 was filed on August 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioners and others were on March 4, 1981, convicted on various counts relating to the operation of an enterprise involved in the manufacture and distribution of "pirated" eight-track and cassette tapes. Petitioners were each convicted on one count of conspiracy to conduct an enterprise involving illicit reproduction of eight-track and cassette tapes through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 1); a substantive RICO offense, in violation of 18 U.S.C. 1962(c) (Count 2); interstate transportation of the pirated tapes, in violation of 18 U.S.C. 2314 (Counts 4-9); and conspiracy to violate the copyright laws, in violation of 18 U.S.C. 371 (Count 50). Petitioners also were convicted on several counts of wire fraud, in violation of 18 U.S.C. 1343, petitioner McCulloch on five counts (Counts 20-24), and petitioner Jones on eight counts (Counts 13-19 and 21). Petitioner Jones was sentenced to a total of ten years' imprisonment; petitioner McCulloch was sentenced to a total of five years' imprisonment. _/ The court of appeals

---

_/ Petitioners' sentences were distributed over the various counts as follows:

> McCulloch was sentenced to consecutive terms of two years on Count 1, two years on Count 2, and one year on Count 4. He was also sentenced to concurrent terms of two years on each of Counts 5-9, two years on each of Counts 20-24, and one year on Count 50, all of these sentences to run concurrently with the sentence on Count 1.
>
> Jones was sentenced to terms of two years each on Counts 1, 2, 4, 5, and 6, each sentence to run consecutively. He was also sentenced to concurrent terms of two years each on Counts 7, 8, 9, and 13, five years each on Counts 14-19 and 21, and one year on Count 50, all of these sentences to run concurrently with the sentences on Counts 1, 2, and 4.

affirmed (United States v. Drum, 733 F.2d 1503 (11th Cir. 1984)), and this Court denied certiorari (469 U.S. 1061 (1984)).

Subsequently, this Court issued its decision in Dowling v. United States, 473 U.S. 207 (1985), in which it held that criminal penalties could not be imposed under the National Stolen Property Act, 18 U.S.C. 2314, for the interstate transportation of pirated records or tapes. Petitioners then moved, pursuant to 28 U.S.C. 2255, to have their convictions under that statute, as well as some of their other convictions, set aside. The district court vacated the convictions under 18 U.S.C. 2314 but rejected petitioners' arguments that their RICO and wire fraud convictions were also affected by Dowling. Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986). The court of appeals affirmed in a judgment order, relying on the district court's opinion (87-5170 Pet. App. 1a-2a).

2. The evidence at trial showed that from 1974 through 1979 petitioners and others were involved in the manufacture and distribution of "pirated" eight-track and cassette tapes. Pirated tapes are made through unauthorized reproduction of copyrighted sound recordings. Petitioners conducted these operations in several states, including Florida, North Carolina, South Carolina, Kentucky, and Maine. By early 1979, the group had established three major interrelated and interdependent manufacturing operations, each of which bought and sold tapes and supplies from the others, shared information concerning law enforcement, and had common customers. During the time of the conspiracy, the entire enterprise manufactured, duplicated, and distributed over five million pirated tapes per year.

Petitioner Jones and co-defendant Ferrol McKinney worked together manufacturing pirated eight-track tapes. Jones duplicated the tapes and McKinney wound them, while another co-conspirator helped locate customers. Co-defendant Frances Lockamy assisted McKinney in processing orders for the pirated

tapes. Petitioners McCulloch and Jones picked up and delivered orders and raw materials. Co-defendant George Washington Cooper sold pirated tapes and provided Jones with background labels for pirated tapes. Tr. 1459-1469, 1477-1478, 1483-1489, 1491-1495, 1534-1535, 1545-1549, 1567-1569. _/

From October 1977 through June 1979, the FBI conducted an investigation of this enterprise, securing videotapes of the conspirators' conversations and the delivery and sale of pirated tapes. In addition, for a period during the spring of 1979, agents recorded conversations from the telephones of another co-conspirator, who later testified for the goverment at trial. The FBI eventually executed search warrants for the homes or business premises of several of the conspirators, including petitioner Jones. FBI agents recovered large quantities of pirated tapes and related supplies and equipment in the course of those searches.

3. In considering petitioners' motions for collateral relief, the district court concluded (639 F. Supp. at 178-179) that they were entitled to raise the issue of the validity of their convictions under 18 U.S.C. 2314, despite the fact that the same question had been decided against them on direct appeal, because there had been a significant change in the law by virtue of the Dowling decision, which could result in a finding that these convictions were "fundamentally defective." See Davis v. United States, 417 U.S. 333 (1974). The court then determined that the Dowling decision should be given retroactive effect, because it meant that petitioners had "been convicted of an act that the law no longer classifies as criminal" (639 F. Supp. at 179). Accordingly, the district court vacated petitioners' convictions on Counts 4-9, the counts based on the charge of interstate transportation of stolen property (ITSP) (ibid.).

_/ "Tr." refers to the trial transcript, found in volume 29 of the record in the court of appeals on the direct appeal.

Petitioners further argued in their Section 2255 motions that their RICO convictions should also be vacated as no longer supported by the requisite predicate acts. Both RICO counts had alleged predicate acts of racketeering consisting of the various counts of wire fraud and interstate transportation of stolen property charged as substantive counts 11 through 49 of the indictment. 639 F. Supp. at 180, 187. In addition to the six ITSP counts on which both petitioners were convicted, petitioner McCulloch was convicted on five counts of wire fraud, and petitioner Jones on seven counts of wire fraud, all of which were alleged as predicate acts of racketeering in the RICO counts.

Petitioners argued, relying on United States v. Dansker, 537 F.2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), and United States v. Brown, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), that there was no way of telling on which predicate acts the jury had relied in convicting on the RICO counts. In Dansker, the Third Circuit reversed one of two substantive bribery counts because of the insufficiency of the evidence, and then also reversed the conspiracy count, which had alleged as its objective one or the other of the two bribes charged in the substantive counts. The same court extended Dansker in Brown, a case involving a RICO conviction. Once the court reversed for insufficiency of the evidence two of the substantive counts that were alleged as racketeering acts, the court felt bound by the reasoning of Dansker to reverse the RICO counts as well, despite the fact that two valid substantive counts remained. 583 F.2d at 669. By analogy, petitioners here argued that because the jury might have based the RICO convictions on two of the invalid ITSP counts, the RICO counts must be reversed.

The district court rejected this argument, relying instead on the contrary reasoning of the former Fifth Circuit in United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied,

464 U.S. 965 (1983), which is controlling precedent in the Eleventh Circuit as well (639 F. Supp. at 181). The court in Peacock distinguished Dansker as a case that involved a conspiracy count alleging several possible objectives, where the jury's guilty verdict might have rested on an objective for which the evidence was insufficient. By contrast, the court reasoned, a RICO conviction requires only that the defendant be found guilty of two racketeering acts that are related to the affairs of the enterprise. Disagreeing with Brown, the court in Peacock concluded that as long as a defendant remained validly convicted of at least two racketeering acts, as revealed either in a special verdict or in the verdict on substantive counts, there was no reason to disturb the RICO conviction simply because some of the other substantive convictions were invalid. 654 F.2d at 348. The district court in this case, following the same reasoning, concluded that the RICO convictions remained valid because each petitioner had been convicted on multiple counts of wire fraud, leaving more than the minimum necessary predicate acts (639 F. Supp. at 182).

ARGUMENT

Petitioners here renew their challenge to their RICO convictions, claiming that the memorandum decision of the court of appeals affirming the district court in this case conflicts with the Third Circuit's holdings in Dansker and Brown, as well as with similar decisions of other circuits. First, the decision below was correct. Moreover, an examination of the cases shows that Brown was an unwarranted extension of Dansker and all the other conspiracy cases to which petitioners refer, so that the decision below does not even arguably conflict with any case except Brown, which has subsequently been limited and ignored by the Third Circuit. Finally, because Brown was decided on direct appeal while this case involves a collateral attack, there is no clear conflict between the results in the two cases.

1. As the former Fifth Circuit explained in United States v. Peacock (654 F.2d at 348), the Third Circuit's reasoning in Brown fails properly to understand RICO prosecutions. In order to sustain a conviction that rests on certain underlying findings -- such as a conspiracy or RICO verdict -- the court, of course, must be able to conclude that the jury did not rest its verdict on an invalid premise. In a RICO case, the verdicts on substantive counts that also constitute the predicate acts charged in the RICO offense serve the function of special verdicts, demonstrating that the jury did indeed find the defendant guilty of particular racketeering acts. If some of the convictions for predicate acts are later found invalid, but at least two valid convictions for underlying crimes remain, then it is still clear that the jury found the defendant guilty of at least two acts of racketeering for purposes of the RICO offense. This is especially true in this case where, as the district court noted (639 F. Supp. at 180), the wire fraud indictments incorporated the Government's account of the criminal conspiracy (id. at 186-187). The jury's decision to convict on the wire fraud counts therefore demonstrated that it found those acts of wire fraud to be in furtherance of the criminal enterprise charged in the substantive RICO and RICO conspiracy counts. _/ There is thus no reason to doubt that the jury made

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_/ Because the wire fraud indictments incorporated a description of the RICO enterprise, the Third Circuit might well find the RICO convictions here permissible under Brown. In United States v. Riccobene, 709 F.2d 214, 228, cert. denied sub nom. Ciancaglini v. United States, 464 U.S. 849 (1983), that court of appeals explained that RICO convictions will be upheld under Brown "when the reviewing court can determine that the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge." It is but a small step from that proposition to the conclusion that the RICO convictions should be upheld when the court is confident that the jury did rely on unchallenged predicate offenses, whether or not it may also have considered others. Indeed, the Third Circuit has upheld a RICO conviction, without citing Brown, where it invalidated some of the predicate convictions but left standing two or more convictions for RICO predicate offenses (United States v. Boffa, 688 F.2d 919, 934 (1982), cert. denied, 460 U.S. 1022 (1983)).

the findings necessary for a RICO conviction, and the court of appeals decided this case correctly.

As this discussion of the structure of RICO prosecutions shows, the Third Circuit's decision in Brown goes beyond its decision in Dansker and does so incorrectly. _/ The situation in a RICO case is quite different from one where, in a conspiracy count alleging several different objectives, the jury has been instructed that it can convict on the basis of any one objective. If any of those objectives is later found invalid or insufficiently proved, then the problem is that it cannot be determined whether the jury rested its verdict on an impermissible basis. United States v. Dansker, 537 F.2d at 51. Each of the cases other than Brown on which petitioners rely is similar to Dansker, involving multiple-object conspiracy counts where the jury was instructed that it could find any one of the objects in order to convict. United States v. DeLuca, 692 F.2d 1277, 1281 (9th Cir. 1982); United States v. Irwin, 654 F.2d 671, 680 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Kavazanjian, 623 F.2d 730, 739 (1st Cir. 1980); United States v. Carman, 577 F.2d 556, 566-568 (9th Cir. 1978); Van Liew v. United States, 321 F.2d 664, 672 (5th Cir. 1963). _/

2. The court of appeals in Peacock acknowledged its disagreement with the Third Circuit in Brown and refused to extend the reasoning of Dansker to the RICO context (654 F.2d at

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_/ No other court of appeals has adopted the reasoning in Brown. Both the Seventh Circuit (United States v. Anderson, 809 F.2d 1281, 1285 (1987)) and the Ninth Circuit (United States v. Lopez, 803 F.2d 969, 976 (1986), cert. denied, No. 86-6397 (Apr. 27, 1987)) have referred to Brown in cases where they found it inapplicable to the facts at hand; the Ninth Circuit specifically noted that it had not adopted the rule of Brown (ibid.).

_/ Even in that situation, however, some courts uphold the conspiracy counts. See, e.g., United States v. Dixon, 536 F.2d 1388, 1401-1402 (2d Cir. 1976); United States v. Papadakis, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Tanner, 471 F.2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); Moss v. United States, 132 F.2d 875, 878 (6th Cir. 1943).

348). Similarly, the district court in this case noted the disparity between the two courts of appeals (639 F. Supp. at 181). The decision here, however, does not actually conflict with the decision in Brown, which involved a direct appeal rather than a collateral attack. _/

As noted above, the district court in this case concluded that petitioners were entitled to the benefit of this Court's decision in Dowling, although their convictions already had been affirmed, because conviction for acts no longer considered criminal constitutes a "complete miscarriage of justice." See Davis v. United States, 417 U.S. at 346. Thus they were entitled to relief under 28 U.S.C. 2255, and the district court properly vacated their convictions for interstate transportation of stolen property. It is quite another matter, however, to make the derivative claim that vacation of the ITSP counts further mandates reversal of the RICO counts, particularly when the jury's verdicts of guilty on each of the substantive wire fraud counts specifically show that petitioners were found guilty of more than the requisite number of racketeering acts. As our discussion above demonstrates, reversal of the RICO conviction because of unrealistic and attenuated doubts as to the basis for the jury's verdict is a questionable action on direct appeal; there is certainly no reason to allow such relief on collateral review.

As this Court stated in United States v. Addonizio, 442 U.S. 178, 184 (1979) (footnotes omitted): "It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds

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_/ We note in addition that in Brown the Government had conceded that Dansker required reversal at least of the RICO conspiracy count (583 F.2d at 669). It is impossible to say how the Third Circuit would have decided the case in the absence of such a concession.

for collateral attack on final judgments are well known and basic to our adversary system of justice." The Court has repeatedly held that a claimed error, in order to justify relief on collateral review, must be so fundamental that it would result in a "complete miscarriage of justice." Id., at 184-185; Stone v. Powell, 428 U.S. 465, 477 n.10 (1976); Davis v. United States, 417 U.S. at 346; Hill v. United States, 368 U.S. 424, 428 (1962); cf. Houser v. United States, 508 F.2d 509, 513-518 (8th Cir. 1974). Petitioners' claim that their RICO convictions are flawed rests on the suggestion that the jury, although convicting them of acts of wire fraud described in the indictment as part of the ongoing RICO project, may have thought that those acts were not related to the RICO enterprise. Such a speculative, attenuated objection does not suggest a fundamental error. Further review would be inappropriate. _/

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1987

_/ Petitioner Jones also argues (87-5266 Pet. 10-12) that another effect of the decision in Dowling is to constructively amend the indictment, in violation of his right to be indicted by a grand jury. The courts below correctly rejected this claim, which is insubstantial. As the district court pointed out, petitioner could cite no case in support of his argument that a post-conviction change in the law acts to amend an indictment. Furthermore, there is no reason to distinguish this situation from one in which convictions are reversed on appeal based on insufficient evidence or trial error; in such cases it is never suggested that the indictment has been constructively amended by the action of the appellate court. Finally, the district court observed that it would be anomalous for the defendants to argue on one hand that their convictions should be modified because of the Dowling decision, and on the other hand to claim that those modifications impermissibly amend the indictment. 639 F. Supp. at 183.

EDITOR'S NOTE

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CASE NO. 87-5170

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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JOHN C. McCULLOCH, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

OCT 30 PAGE 13

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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9

QUESTION FOR REVIEW

WHETHER CONVICTIONS FOR PARTICIPATION IN A RACKETEER INFLUENCED AND CORRUPT ORGANIZATION (RICO), AND RICO CONSPIRACY, MAY STAND IN LIGHT OF SUBSEQUENT VACATION OF CONVICTIONS OF THE PREDICATE ACT CRIMES UPON WHICH THE TWO RICO CONVICTIONS MAY HAVE BEEN BASED, AND WHERE THERE WAS NO SPECIAL JURY VERDICT INDICATING UPON WHICH PREDICATE ACTS THE JURY RELIED IN FINDING GUILT ON THE RICO AND RICO CONSPIRACY CHARGES.

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PETITIONER'S REPLY TO ARGUMENTS FIRST RAISED IN GOVERNMENT'S BRIEF

The Government's Brief in Opposition first raises the issue of whether a conflict actually exists between the ruling of the Eleventh Circuit herein, and the ruling of the Ninth Circuit in United States v. Brown, 583 F. 2d 659 (3d Cir. 1978), Cert. Den. 440 U.S. 909 (1979), because this appeal is from a collateral attack on convictions, while Brown involved a direct appeal.

Of course, the District Court opinion herein expressly recognized the conflict between its ruling and that in Brown. Cooper v. United States, 639 F. Supp. 176, 181 (M.D. Fla. 1986). It was that District Court opinion which the Eleventh Circuit specifically adopted as its own in this cause. The Government now asserts, though, that relief under a 28 USC §2255 Motion should only be granted where the convictions were "fundamentally defective." It asserts that such is not the case on a direct appeal.

The Government ignores the District Court's own opinion herein in this regard, though. There, it was reasoned that a "complete miscarriage of justice" would occur if collateral relief were not granted to the Petitioner. Id., at 179. In fact, relief was granted as to six of his convictions. The only issue was whether that relief would, in turn, require the vacation of further convictions. The Courts below concede that it would in the Third Circuit, though it does not in the Eleventh Circuit. Thus, there lies at the heart of this case the classic conflict which should give rise to a Writ of Certiorari. If it is not a "fundamentally defective" application of justice to allow convictions to stand in one part of this country and not in another part under the same facts, we must be living in a world only Franz Kafka could appreciate.

CONCLUSION

The Petition for a Writ of Certiorari should be granted herein because of an express, direct conflict between two Circuit Courts on a significant question of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies hereof have been furnished to: Honorable Charles Fried, Solicitor General, William F. Weld, Assistant Attorney General, and Kathleen A. Felton, Attorney, Department of Justice, Washington, D.C. 20530; and Eugene Loftin, Esquire, 220 East Forsyth Street, Jacksonville, Florida 32202, by mail, this 22nd day of October, 1987.

Hugh A. Carithers, Jr.
Attorney

(LBS#51-MCCUL1-2)

SUPREME COURT OF THE UNITED STATES

87–5170 JOHN C. McCULLOCH *v.* UNITED STATES

87–5266 JERRY HERBERT JONES *v.* UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 87–5170 AND 87–5266. Decided November 9, 1987

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In March, 1981, petitioners were tried for their participation in an interstate network that duplicated and distributed unauthorized reproductions of copyrighted sound recordings—so-called "pirated" tape recordings. At the conclusion of their trial, the petitioners were convicted of numerous counts of interstate transportation of pirated tapes (18 U. S. C. § 2314), conspiracy to violate the copyright laws, and wire fraud. Also, using these substantive convictions as "predicate acts," the Government successfully prosecuted petitioners for conducting (and conspiring to conduct) a racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U. S. C. §§ 1962(c) and (d).

Subsequently, in *Dowling* v. *United States*, 473 U. S. 207 (1985), this Court held that criminal penalties could not be imposed for interstate transportation of pirated tapes under 18 U. S. C. § 2314. As a result, petitioners initiated this action, pursuant to 28 U. S. C. § 2255, to have their convictions set aside. The district court vacated the convictions under § 2314, but refused to alter petitioners' convictions for wire fraud or the RICO violations. *Cooper* v. *United States*,

639 F. Supp. 176 (M. D. Fla. 1986). The Court of Appeals affirmed in a judgment order, relying on the district court's opinion. App. to Petn. 87–5170 A–2.

These petitions present the question of whether a RICO conviction may stand when some—but not all—of a defendant's convictions for the predicate acts which are the basis of his RICO conviction are vacated. Here, the district court vacated six of petitioner McCulloch's eleven predicate-act convictions, and six of petitioner Jones' fourteen convictions. *Cooper*, *supra*, 639 F. Supp., at 187. The jury's verdict on the RICO counts did not indicate which of these various predicate acts formed the basis on which it found "a pattern of racketeering activity." 18 U. S. C. § 1962(c). The district court allowed the RICO convictions to stand.

The courts below followed a prior decision of the Fifth Circuit, *United States* v. *Peacock*, 654 F. 2d 339 (CA5 1981), cert. denied, 464 U. S. 965 (1983). There, the Fifth Circuit vacated several convictions for predicate acts committed by three RICO defendants, but concluded that where "each of the appellants [was properly] convicted of at least two racketeering acts which were related to the . . . enterprise," their RICO convictions remained valid. *Peacock*, *supra*, 654 F. 2d, at 248. The Fifth Circuit recognized that this holding was in conflict with an opposing conclusion reached in *United States* v. *Brown*, 583 F. 2d 659 (CA3 1978), cert. denied, 440 U. S. 909 (1979), where the Third Circuit reversed two defendants' RICO convictions when two of their four convictions for predicate acts were found to be invalid. *Brown*, *supra*, 583 F. 2d, at 669. The Seventh and the Ninth Circuits have recognized this conflict, but have declined to adopt either position to date. *See United States* v. *Anderson*, 809 F. 2d 1281, 1284–1285 (CA7 1987); *United States* v. *Lopez*, 803 F. 2d 969, 976 (CA9 1986), cert. denied, —— U. S. —— (1987).

Because of the disagreement and uncertainty among the Courts of Appeals over the proper application of this important federal criminal statute, I would grant certiorari to resolve the conflict.